

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION AT CINCINNATI**

UNITED STATES OF AMERICA,

Plaintiff,

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Case No. 1:19-cr-084

Civil Case No. 1:24-cv-288

- vs -

District Judge Susan J. Dlott

Magistrate Judge Michael R. Merz

MARKEITH FORD,

Defendant.

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**DECISION AND ORDER DENYING MOTION TO COMPEL**

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This case under 28 U.S.C. § 2255 is before the Court on Motion of the United States for an order that

requires the defendant to execute a written waiver of the attorney-client privilege with respect to the claims of ineffective assistance of counsel that he has raised in his motion under 28 U.S.C. § 2255 to vacate sentence, and upon the filing of the written waiver, authorizes the defendant's prior counsel to provide to the United States an affidavit or declaration that elaborates the facts related to those claims.

(Motion, ECF No. 150, PageID 1645).

The Motion represents that the trial attorney for the United States in this matter

has recently been advised defendant's trial attorney and appellate attorney have declined to speak voluntarily with government counsel regarding the defendant's allegations of ineffective assistance of counsel, in light of Formal Opinion 10-456 of the

American Bar Association's Standing Committee on Ethics and Professional Responsibility ("Formal Op. 10-456") (opining that, absent informed consent by the former client, a lawyer may not disclose confidential information relating to the former client's ineffective assistance claims outside of formal, court-supervised proceedings).

*Id.* The Magistrate Judge is unwilling to act on the basis of unattributed hearsay. More importantly the undersigned believes it is important to place responsibility for their refusal (assuming that refusal was communicated through a reliable source) squarely on the shoulders of the attorneys involved.

In ordering an Answer in this case, the Court wrote

Defendant has made claims relating to conversations between himself and his trial and appellate counsel. A claim of ineffective assistance of counsel impliedly waives the privilege as to any attorney-client communications relevant to any such claim. *In re Lott*, 424 F.3d 446 (6<sup>th</sup> Cir. 2005); *Tasby v. United States*, 504 F.2d 332 (8th Cir. 1974); *Randall v. United States*, 314 F.2d 800 (10th Cir. 1963); *United States v. Ballard*, 779 F.2d 287 (5th Cir. 1986); *Laughner v. United States*, 373 F.2d 326 (5th Cir. 1967); *Crutchfield v. Wainwright*, 803 F.2d 1103 (11th Cir. 1986). The Court finds that Defendant has waived the attorney-client communication privilege for any communications relevant to his claims made in the § 2255 Motion.

(ECF No. 145, PageID 1638). If Defendant's former attorneys believe this recognition of implied waiver is insufficient to overcome the American Bar Association Formal Opinion cited in the Motion, they should support their reluctance with a memorandum to that effect. If a more formal court proceeding is desired either by the United States or Defendant's prior counsel, the Court believes the proper method to proceed is to set depositions for counsel at which the Magistrate Judge would be pleased to preside<sup>1</sup>.

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<sup>1</sup> This would obviate any delay in the unlikely event that contempt sanctions are appropriate.

Accordingly, Plaintiff's Motion is DENIED. Attorneys Lockard and Friend are ORDERED to prepare and file under seal not later than August 19, 2024, either an affidavit or a declaration under penalty of perjury under 28 U.S.C. § 1746 setting forth all their communications with Defendant which are relevant to his claims of ineffective assistance of trial or appellate counsel. To allow Plaintiff adequate time to reflect Defendant's counsel's responses, the Court *sua sponte* extends the date on which an answer must be filed to and including September 4, 2024.

The Clerk shall provide email copies of this Order to Zenaida Lockard and Noah Friend and note that service on the docket.

August 9, 2024.

*s/ Michael R. Merz*  
United States Magistrate Judge